

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TOM DAVID

Appeal No. 97-2462
Application 29/031,592¹

ON BRIEF

Before, COHEN, JOHN D. SMITH and LEE, Administrative Patent
Judges.

COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of the
following design claim:

-- The ornamental design for a pepper mill
as shown and described. --

¹ Application for patent November 29, 1994.

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The pepper mill design is depicted in front elevational, side elevational, rear elevational, and top plan views in Figures 1 through 4, respectively².

As evidence of obviousness, the examiner has relied upon the following references:

David (David '746)	Des. 303,746	Oct. 3, 1989
David (David '536)	Des. 313,536	Jan. 8, 1991
Dolson	2,465,637	Mar. 29, 1949

The following rejection is before us on appeal.

The design claim stands rejected under 35 U.S.C. § 103 as being unpatentable over David '536 in view of David '746 and Dolson³.

² Appellant's specification sets forth that the non-illustrated bottom face of the pepper mill is unornamented. We take this statement to denote that the bottom face of the pepper mill is a plain, unornamented bottom, thereby conforming with the Manual of Patent Examining Procedure (M.P.E.P.) § 1503.02, "A. Views".

³ The rejection refers to "one" of ordinary skill. More appropriately, in design cases, reference should be made to a designer of ordinary skill. See In re Nalbandian, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981).

The full text of the examiner's rejection and response to the argument advanced by appellant can be found in the answer, while the complete statement of the argument made by appellant appears on pages 4 through 8 of the brief.

OPINION

In reaching our conclusion on the obviousness issue raised in this appeal, we have carefully assessed appellant's disclosed design, the designs of the applied references, and the viewpoints of appellant and the examiner as set forth in the brief and answer, respectively.

As a consequence of our review, this panel of the board makes the determination that the examiner's rejection is not well founded. Our reasoning in support of this conclusion follows.

At the outset, we keep in mind that, in a rejection of a design claim under 35 U.S.C. § 103, there is the requirement that there must be a reference (the basic design), a something in existence, the design characteristics of which are basically the same as the claimed design in order to support a holding of obviousness. In other words, the basic reference design must look like the claimed design. See In re Harvey, 12 F.3d 1061,

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1063-64, 29 USPQ2d 1206, 1208 (Fed. Cir. 1993) and In re Rosen,
673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

From our perspective, appellant's design, considered as a whole, visually portrays a pepper mill appearance significant in its showing of a long tapered base above which rises a cylindrical base top and cap, each of the base top and cap appearing closely adjacent one another.

On the other hand, the reference design evidences a pepper mill with an overall cylindrical appearance wherein the cap rises above the base top, separated therefrom by a visually perceptible tapered portion of the base top, the tapered portion being within the external overall cylindrical form of the pepper mill.

Based upon our visual appreciation of the claimed and reference designs, as described above, we reach the conclusion that the pepper mill design portrayed in the David '536 reference fails to evidence a something in existence, the design characteristics of which are basically the same as in the pepper mill design on appeal. Stated differently, the reference design simply does not look like the claimed pepper mill design. Thus,

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the David '536 patent is not a Rosen reference. Lacking a Rosen reference, the examiner's rejection under 35 U.S.C. § 103 is inappropriate and cannot be sustained.

The decision of the examiner is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	
JOHN D. SMITH)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
)	
JAMESON LEE)	
Administrative Patent Judge)	

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